

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

SCHEDULING ORDER

07-CR-6208L

v.

ALBERT DONALD,

Defendant.

By motion filed December 10, 2009 (Dkt. #107), the Government moved to adjourn sentencing, which was scheduled for December 16, 2009, without date. Because of the motion, I issued a text order adjourning the presently scheduled sentence.

By this order, I direct the Government and defendant to address these issues, in writing:

1. The Government, in its motion, states that if this Court now sentences Donald, on Count 6, based on the present state of the law concerning consecutive sentences under 18 U.S.C. § 924(c), the Government would have no recourse should the United States Supreme Court subsequently reverse the Second Circuit's prior decisions in *United States v. Williams*, 558 F.3d 116 and *United States v. Whitley*, 529 F.3d 150. I would like some clarification and authority as to why the Government feels it has no recourse. The Government now routinely files appeals from sentences

claiming errors either under the Sentencing Guidelines or otherwise. If this Court follows *Williams* and *Whitley*, I fail to see why the Government could not lodge a timely appeal from that judgment.

2. As an alternative, I wonder if there is any authority to bifurcate the sentencing. The Court would sentence Donald on all counts except Count 6 and hold that in abeyance. I suspect, though, that the Second Circuit may not view this sentence as a final judgment and, therefore, such action may preclude Donald from filing an appeal.

3. Although the Government suggests that Donald would not be prejudiced by a lengthy adjournment, since he faces a mandatory minimum 20 year term, I see prejudice to Donald in being unable to appeal his conviction for many months, perhaps as much as a year or more, until the Supreme Court decides the issue here. Donald may have issues other than sentencing ones and the Government's proposal forces him to wait a very lengthy period of time to assert those rights on appeal.

I ask the Government to respond to these issues on or before January 5, 2010; I ask the defendant to reply on or before January 15, 2010.

IT IS SO ORDERED.

A handwritten signature in black ink, reading "David G. Larimer", written over a horizontal line.

DAVID G. LARIMER
United States District Judge

Dated: Rochester, New York
December 15, 2009.